No. 13046

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the Estate of CORINNE CONSTANCE GETLIN, Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE BY APPELLEE

The appellant's statement of the case being acceptable to the appellee, no additions thereto are being made.

SUMMARY OF ARGUMENT

Although there are four specifications of error, there are actually only two real issues involved in the appeal, and they are raised by the first and second assignments of error, respectively.

Based upon the facts of record, the District Judge correctly determined that the issue of whether or not at the time of the accident the decedent was an employee of the insured engaged in her employment was *res judicata* by virtue of the state court action. In the state court action, the appellant, in order to avoid the effect of the Oregon guest statute, pleaded that the decedent was an employee of the insured and at the time of the accident which resulted in her death was being transported by the employer pursuant to a contract of employment. It is the appellee's contention that under this condition the question of whether or not the decedent was engaged in her employer's business at the time of the accident was an issue in the state court action, and having been decided in favor of the appellant in that action, the appellant is now estopped from denying that relationship in this action to collect on the judgment.

The appellee's second argument is that even if the appellant is not estopped by the doctrine of *res judicata,* nevertheless, upon the facts of the record, it is clear that the appellant's decedent was actually engaged in the employment of the assured at the time of her death as an employee, and that since the policy excluded coverage to employees so engaged in the employment of the assured, the appellant is not entitled to recover.

ARGUMENT

I.

The Trial Court correctly determined that the issue of whether or not at the time of the accident the decedent was an employee of the insured and engaged in her employment, was res judicata by virtue of the State Court action. (R. p. 60—Conclusion # 1)

As we understand appellant's position, the error is predicated on the charge that there was no issue in the state court as to whether or not the decedent was "engaged in the employment of the assured" at the time of the accident (Ap. Br. pp. 4 and 6, First Specification of Error), and therefore the doctrine of *res judicata* could not apply (Ap. Br. p. 12). The appellant also discusses the requirements of pleading *res judicata* (Ap. Br. pp. 10-11), but makes no charge that it was improperly pleaded in this case. We believe that the real issue of this specification of error can best be disposed of by first discussing the applicable law on *res judicata,* and then applying it to the factual situation of this case.

THE LAW OF RES JUDICATA

The doctrine of *res judicata* involves two main principles clearly expressed in 50 C.J.S., Sec. 592, at page 11, as follows:

> "(1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes

> a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, as considered infra § 598. (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same, as considered infra §§ 686, 712. These rules afford a logical and convenient method of dividing the numerous cases falling within the principle of res judicata."

This dual phase of *res judicata* was long ago recognized and adopted by the Supreme Court of Oregon, in the case of *Ruckman v. Union Railway Co.,* 45 Or. 578, 78 Pac. 748; and was recently re-expressed in *Winters v. Bisaillon,* 152 Or. 578, 57 P. 2d 1095. The same distinction was noted in *Cromwell v. Sac. County,* 94 U.S. 351, 24 L. Ed. 195, and this Court in *Hatchitt v. United States* (C.C.A. 9), 158 F. 2d 754, quoting from *Northern Pacific R. v. Slaght,* 205 U.S. 122, 130-132, 27 S. Ct. 442, 51 L. Ed. 738, where the same matter was noted.

It is the appellee's contention that the case at bar comes under the second phase, for this is not a new action involving the same cause of action upon which the appellant sued in the state court. The latter cause of action was merged in the state court judgment, and this is a new action based on that judgment. As we read the appellant's authorities under the first assignment of error, beginning with the case of *Taylor v. Taylor,* 54 Or. 560, 103 Pac. 524 (Ap. Br. p. 11), it appears that

the appellant and ourselves concur as to the phase of the doctrine to be applied to this case.

The real and only difference between the parties on this specification of error lies in the application of the doctrine to the facts of this case.

THE STATUS OF DECEDENT AS AN ISSUE IN THE STATE COURT

Under the foregoing authorities it is clear that if the question of decedent's being engaged in the assured's employment was either "directly in issue" or "actually determined" in the state court, the doctrine will apply.

On pages 6 and 7 of his brief, appellant admits that the relationship of the decedent and Kalahar "became an issue" in the state court. He further admits that the obvious reason for the allegation in the complaint that decedent was "an employee" was to avaid proving gross negligence under the Oregon Guest Statute. But what appellant attempts to do is to convey the impression that the only issue in this respect was the existence or non-existence of an employee-employer relationship. He fails to include some allegations and the denial thereof which go clear beyond the mere existence of that relationship and show that one of the issues was whether or not, at the time of the accident the decedent was doing one of the things she was actually engaged to do, i.e., travel from one city to another, as directed by her employer at the time determined by him and by the means provided by him.

We are sure the appellant will not in his reply brief or in his argument take the position that the mere relationship of employer-employee by itself always negates a host-guest relationship. If A employs B to work five days a week, on a monthly wage, and on a Sunday A takes B fishing for their mutual pleasure, it is obvious that while on the fishing trip B occupies a position as guest so far as his rights against B are concerned, even though he is at that time an employee.

If appellant had been satisfied that the mere relationship of employer-employee was sufficient to avoid the guest statute, he could simply have alleged the relationship, the negligence of the employer, and the death, but this he did not do. First, he alleged the hiring of various salesmen and the furnishing of their transportation as a part of their compensation. Then, in paragraph III of the complaint (R. p. 37), he alleged the hiring of decedent and the provision for her transportation. Finally, in paragraph IV (R. p. 37) he specifically and with care alleged that *at the time and place of the accident decedent's "transportation was pursuant to Corinne Constance Getlin's contract of employment with defendant Harold M. Kalahar."*

The issue was joined on each of these allegations by the denial thereof (Defendant's answer, R. p. 34), and therefore we submit that the same were "directly in issue" and thus come within that class of issues covered by the second phase of the *res judicata* rule that a "former judgment is not a bar except as to questions actually determined or directly in issue". *Ruckman v. Union Railway Co.*, 45 Or. 578 at 781, 78 Pac. 748 at 750.

Appellant apparently contends that the phrase "engaged in the employment" is a phrase of art, and that since said words were not used in his complaint, there could have been no such issue (Ap. Br. p. 12). Without allegations which would remove plaintiff from a guest status or a mere employee status, the plaintiff could not have prevailed without proof of gross negligence, which was not alleged. We submit that the allegations of appellant's complaint in the state court action referred to above were intended to, and did, set up the issue that at the time of her death decedent was doing one of the things she was employed to do, i.e., travel from place to place as directed, "pursuant to her contract of employment", which is in essence the same as an allegation that she "was engaged in the employment" of the defendant.

It was the relationship of the decedent and the employer at the time of the accident that was the material issue, as appellant admits at the bottom of page 7 of his brief. In determining that relationship at that time, the jury were instructed to determine whether the decedent was to render personal service to or for the benefit of Kalahar with a right in him to order and control the decedent in that work. The instruction was as follows:

> "I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.

> "You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance."

Now appellant urges that at the time of the accident the relationship was in a dormant state and that decedent was on her own and not doing anything for the employer. Under his theory, the decedent would never have been engaged in her employer's business except for that fleeting monent when she was asking the housewife to subscribe to the Woman's Home Companion, for as the door is shut she ceases to "solicit".

The appellant had his day in court; he recovered a judgment based on the allegation and proof that the decedent was at the time of her death performing a part of her job by riding from one city to another "pursuant to her contract of employment". He should not now be permitted to deny the existence of the determination of the issue which permitted his recovery.

A few comments are required concerning certain other points under appellant's first assignment of error.

On pages 8 and 9 of his brief, appellant refers to certain alleged contentions of the appellee in the District Court and discusses the same. No such contention is here made by appellee, and therefore we shall not discuss the same.

On pages 10 and 11 of appellant's brief, authorities are cited as to the manner of pleading *res judicata*. The record herein contains everything necessary for this Court to determine what issues were before the state court, and since appellant has not charged the District Court with error as to how the issue of *res judicata* was raised, we shall refrain from further comment.

The authorities cited by appellant under this specification of error not being in conflict with the general rules set forth above at pages 3-4, we shall not take the space to discuss them.

We submit that Conclusion of Law No. I of the District Court (R. p. 60) was without error and amply justified on the record.

II.

Decedent was engaged in the employment of the insured, Kalahar, within the meaning of the policy at the time of the accident resulting in her death.

Under the second specification of error, on page 17 of his brief, appellant states as follows:

> "The question here is not whether insured was liable as an employer, under the Employers' Liability Act, or otherwise, nor whether the benefits of a liberally construed Workmen's Compensation Law would have been extended to these employees. The precise question presented here is whether this employee was 'engaged in the employment of the insured' within the meaning of a contract which must be construed strictly against the insurer."

We are in accord that the precise question in appellant's second assignment of error is limited to determining whether or not the decedent was "engaged in the employment of the insured" within the meaning of the policy and that the coverage afforded by Workmen's Compensation Laws and Employers' Liability Acts and cases discussing the same have no bearing on this case. Contrary to appellant's statement on page 16 of his brief, appellee is not interested in having the liberal rules of those statutes applied to this case, for it is wholly unnecessary. This case is to be decided on common law principles, and there are adequate clear authorities in that field. Accordingly, we shall not discuss any of the multiple authorities cited by the appellant in those statutory fields, except the one Oregon case of *Lamm v. Silver Falls Timber Company,* 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375.

Before proceeding with the authorities, we again wish to remind the Court of the unusual factual situation respecting the employment of the decedent and her fellow employees. In examining the authorities on this question, we believe that the following factual points of this case must constantly be borne in mind:

1. The decedent and her fellow employees were hired by Kalahar in Iowa and Nebraska "for the purpose of soliciting magazine subscriptions in various towns from state to state throughout the entire Western United States" (R. p. 15).

2. At the time of the accident, decedent and her co-employees were being transported "from "Spokane,

Washington, where they had been soliciting magazine subscriptions, to Portland, where they were to do like soliciting" (R. p. 16).

3. The transportation of the decedent and the other employees "was pursuant to their respective contracts of employment with Kalahar" (R. pp. 16-17).

4. Contrary to the statement of the appellant in his brief, at the top of page 30, that the decedent "was merely riding in a conveyance gratuitously furnished by the employer", the conveyance was furnished pursuant to the decedent's contract of employment (R. p. 17).

It is apparent from the foregoing facts and from appellant's admission as to decedent's employee status, that what we are actually here concerned with is the determination of the status of an employee during the course of transportation, which transportation is furnished pursuant to an agreement between the employer and the employee, which transportation is an integral part of the employment contract and which employment contract by its very nature required the employee to move from city to city and state to state in the transportation thus accorded, and at the times required by the employer. On the other hand, we are not here concerned with cases determining whether or not the particular decedent was or was not an employee, nor are we here concerned with cases in which the transportation was purely a gratuity offered the decedent, which she might or might not use as it suited her fancy.

We shall now proceed to discuss the various authorities and in so doing are dividing the cases into categories into which they logically fall.

A. The authorities are clear that where, as a part of the contract of employment, the employee is to be furnished transportation from one place of work to another place of work that such an employee is engaged in the employment of the employer while being thus transported.

Lamm v. Silver Falls Timber Co., 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375;

Webb v. The American Fire & Casualty Company, (Fla., 1941), 5 So. 2d 252 (1942);

Gilmore v. The Royal Indemnity Company, et al., Ohio Court of Appeals, 1st Appellate Dist., Hamilton County (1946), reported in 24 Automobile Cases 1091;

State Farm Mutual Automobile Insurance Co. v. Brooks (C.C.A. 8th, 1943), 136 F. 2d 807; certiorari denied, 320 U.S. 768, 88 L. Ed. 459.

Before discussing cases involving insurance policies, we believe it will be helpful to review the common law on the question of the liability of a master to a servant for injuries received while being transported by the master. Appellant has placed great reliance on *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375, which was a case involving the Oregon Workmen's Compensation Act (See App. Br., p. 21 et seq.). In the third and final opinion of that case, the Court, in setting forth the common law rule on such transportation, quoted and commented upon Labatt, Master and Servant (2d Ed.), § 155, as follows

at page 525 of the Oregon Report, and page 375 of Vol. 291 Pac.:

" . . . Since the plaintiff sustained his injury while riding upon a railway car, operated by defendant, we shall consider only the sub-division of the above common law rule which the courts applied in similar instances.

"From Labatt's Master and Servant (2d Ed.), § 155, we quote:

" 'A servant who, at the time of the accident in suit, was being transported on a railway car or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment, and therefore can not recover if the injury was the result of risk known to and appreciated by him. . . . The inability of such employees to recover has been affirmed, both where the accident occurred while they were journeying between two points at which work was to be done, and where it occurred while they were being transported from the place where they resided to the place where they worked.'

"In the succeeding language Mr. Labatt points out that the law regarded the employees as under the control of his master in the above situations; the mere fact that the latter permitted the servant to sit inert, and did not demand the performance of active duty during the transportation was not deemed a negation of the right. Likewise the common law regarded the conveyance as an instrument which facilitated the performance of the work in hand like any tool or piece of machinery employed in the achievement of the desired result. But, according to Mr. Labatt, when the 'injured person was traveling entirely for his own purposes, and the right of the master to exact the performance of services was not merely dormant, but wholly suspended,' the defense of common employment was not available because under such circumstances the

employee was not engaged in the course of his employment."

We submit that the foregoing adequately answers the appellant's contention that an employee is engaged in employment only when actively engaged with his hands. In the present case it is obvious from the nature of the employment that it was essential to the employer that his employees travel in the vehicle provided, from and to the designated cities and states, at the times determined by him; otherwise his crew would not have kept together. Under such circumstances, the conveyance should be considered "as an instrument which facilitated the performance of the work in hand like any tool or machinery". *Lamm v. Silver Falls Timber Co.*, supra.

It will be apparent to the Court after reading the authorities cited by the appellant and those hereinafter discussed that the largest number of cases are involved with transportation of employees from their home to their place of employment or from the place of employment to their homes. In some of these cases the transportation is a part of the contract of employment; in some it is not. The instant case is not one of transportation from home to place of employment or vice versa, but is one in which the transportation from one place of work to another was an integral part of the employment. A diligent search of all of the authorities involving suits to recover under insurance policies having exclusionary clauses similar to the one in question reveals but two, and possibly three, cases involving transportation from one place of work to another place of work.

The first of these cases is that of *Webb v. The American Fire & Casualty Company* (Fla., 1941), 5 So. 2d 252. In that case the employee was engaged by the insured as a clerk under a contract and agreement by which she was to work as a clerk in either a store located at Deerfield, Florida, or another store located at Pompano, Florida, as and when her services should be required at either place, and that as compensation for her services she was to receive a stated weekly salary, was to be provided with room and board and was to be transported to and from the store or stores where she was to work. On the day of the accident, the plaintiff was being transported from the store at Pompano to the store at Deerfield, from whence she was to be transported to the place where she was furnished her board and room. The policy held by the employer in that case had an exclusionary clause almost identical with the one in this case (see R. p. 17) and which read as follows:

> "This policy does not apply . . . to bodily injury or death of any employee of the Insured while engaged in the business of the Insured (other than domestic employment in the home) or in the operation . . . etc."

The Supreme Court of Florida held that at the time of her injury the plaintiff was an employee engaged in the business of the insured.

Appellant, on page 27 of his brief, seeks to disparage the authority of this case on the grounds that the authorities mentioned by the court as being binding precedents were Workmen's Compensation cases wherein

the words involved were "arising out of the employment", which, he states, the Florida court failed to distinguish from the words of the policy "engaged in the business". Our reply is that the decision was based on specific facts and a specific policy, both like those in this case, and on those facts the court held the employee to be "engaged in the business of the assured". To say that the cases referred to by the court were not in point, or that the lawyers did not properly present the case is a feeble attempt to avoid a clear-cut decision.

The second of the three cases and the only case involving a crew of salesmen being transported under circumstances identical to those in the present case is the case of *Gilmore v. The Royal Indemnity Company, et al.,* Ohio Court of Appeals, 1st Appellate Dist., Hamilton County (1946), reported in 24 Automobile Cases 1091. In that case the defendant insurance company had insured an employer under a liability policy containing an exclusion clause reading as follows:

> "(e) Under coverage A, to bodily injury to or death of *any employee of the insured while engaged in the business of the insured,* other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the insured may be held liable under any Workmen's compensation law;" (Italics supplied)

The insured in that case sold his products in various cities by a crew of saleswomen in charge of a crew manager who operated the insured's automobile that was used to transport the crew to various cities where they worked. In response to the insured's advertisement for

sales persons, the plaintiff in the case was interviewed by the insured, and terms of employment were agreed upon on a salary and commission basis. The plaintiff was to begin work on the Monday following her employment in El Paso, Texas. Pursuant to this agreement, it was arranged for the plaintiff to accompany the sales crew in the insured's automobile on Sunday from San Antonio to El Paso, where actual work was to begin on Monday morning. No selling was contemplated on Sunday, and while the crew were enroute, in the charge of the crew manager, the accident occurred, resulting in plaintiff's injuries. Plaintiff sued the insured in Texas, alleging in her complaint that she was an employee of the insured and that by the terms of the contract of employment the insured had agreed to furnish transportation to her to the various places where plaintiff was to sell defendants' products, and that she was injured pursuant to her contract of employment. Plaintiff recovered judgment by default in that action, the judgment stating that the facts as alleged in the complaint were found to be true. The plaintiff then brought an action in Ohio against the defendant insurance company to recover under the policy. The insurance company raised the defense that there was no coverage because the employee fell within the exclusion clause above. The court, in finding for the defendant insurance company, held that the plaintiff was bound by the allegations in her Texas petition, which were incorporated into the Texas judgment and which facts brought her "squarely within exclusion E of the policy." This exclusionary clause, as shown above, was "engaged in the busi-

ness of the insured", which, except for the use of the word "business" instead of "employment" is identical with the case at bar.

Appellant ignores this express determination in seeking to avoid the effect of this case, by quoting a paragraph (Ap. Br. p. 28) wherein the court gives the general common law rule and uses the phrase "course of employment". Here again the appellant cannot avoid an exact decision on specific facts which in all relevant particulars is on all fours with the present case.

One of the leading cases on this question is that of *State Farm Mutual Automobile Insurance Co. v. Brooks* (C.C.A. 8th, 1943), 136 F. 2d 807; certiorari denied, 320 U.S. 768, 88 L. Ed. 459. We have included this case as being one involving transportation from place to place rather than from place of employment to home, with some hesitance, because from the inconsistent findings of the trial court in the case, this fact is uncertain. However, we have included it under this group because one of the appellant's authorities upon which he heavily relies, to-wit, *B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Casualty Company* (10 Cir.), 147 F. 2d 536 (Ap. Br., pp. 18 and 19), in discussing the *State Farm Mutual Automobile Insurance Company v. Brooks* case (supra), stated that it was a case where employees were being transported "from one place of work to another place of work to perform additional duties at the latter place". (See 147 F. 2d 536 at 539.)

In *State Farm Mutual Automobile Insurance Company v. Brooks* (supra), the policy holder was operating

a fuel yard at Joplin, Missouri. As a part of his business, he secured wood from points outside of Joplin. The policy holder hired two boys, who accepted temprorary employment "at the place where the wood was obtained, to collect it and pile it for loading and transportation in the truck covered by the policy to the assured's fuel yard at Joplin". Sometimes when the truck arrived from its last trip of the day at Joplin, the two boys would help to unload it. It was understood between the employees and the policy holder that they would be carried to and from the place where they collected and piled the wood to Joplin, as they had no other means of transportation. The action was one for a declaratory judgment by the insurance company against the policy holder to determine its liability for the payment of a judgment which had been secured against the policy holder for the death of one boy and serious injuries to the other. The policy contained an exclusion clause, reading as follows:

> "This policy does not apply: . . . to bodily injury to or death of any employee of the insured while engaged in the business . . . of the insured."

In holding that the exclusionary clause applied, Justice Woodrough, speaking for the 8th Circuit Court of Appeals, stated as follows, at page 811:

> "The thirty-five miles of travel by the truck between the yard at Joplin and the slab pile was also clearly within the employment of the boys in the business. The appellees have cited cases in which such transportation was not so included, as in Green v. Travelers Insurance Company, 286 N.Y. 358, 36 N.E. (2d) 620, where berry-pickers

> employed on a piece basis were free to go to and come from the fields as they chose, but were given a ride as an accommodation. Here the boys had no other means of getting to the slab pile, as their transportation back and forth was contemplated in the contract of employment and was a necessary part of the insured's business."

The court then went on to hold that as a *matter of law* the claims asserted against the insured were not within the coverage of the policy.

In an effort to distinguish this case, appellant (Ap. Br., pp. 28-30) asserts a difference in facts, each of which we shall compare with the present case.

First: He states that the employees in that case were "required" to ride from where they worked during the day to their homes where they sometimes helped unload the wood. This is no different from the "requirement" that decent travel from city to city and state to state to perform her work as a magazine solicitor.

Second: He states that the boys in the *Brooks* case were paid by the day, while the decedent was paid a commission. We agree that the daily wage in the *Brooks* case probably took into account the time of transportation, but it is just as surely true that the rate of commission in this case must have taken into account the travel time necessary between cities and states.

Third: The transportation in the *Brooks* case is stated to have been "an essential part of the work", yet the appellant herein in his complaint (R. p. 37)

has effectively established the essentiality of the transportation in this case by alleging that the same was furnished "pursuant to the contract of employment"; and how could the entire western part of the United States have been covered without transportation being an essential element of the relationship?

Fourth: Appellant finally concludes his distinction by a statement that in this case the transportation was "gratuitously furnished". Earlier in the same paragraph, however, he stated that the injured person in the *Brooks* case was given "free transportation." We don't see any distinction, and furthermore, for an employee *not* to be "gratuitously furnished" the tools or machinery with which he accomplishes the task for which he is employed is indeed the rare exception.

The three foregoing cases are the only cases we have been able to find involving a factual situation where the employee is being transported from one place of employment to another. They are almost on all fours with the current case, for the following reasons:

1. Each has an almost identical exclusion clause to the one at bar.

2. In each case the transportation was an integral part of the contract of employment.

3. In each case the employees were transported from one place to another rather than from a place of work to home or from home to the place of work.

4. In each case the injured persons were not performing any active function for their employees at the time the injuries occurred, but were merely riding in the respective vehicles.

5. In each case the original suits by the plaintiffs against the employers were on common law grounds and were not actions under employer's liability or workmen's compensation acts.

We submit that the three foregoing cases, which are the only cases identical in factual matters with the case at bar, are determinative of the fact that in this case the decedent was engaged in the employment of the insured while being transported from one place of work to another.

B. Even where the transportation is merely to or from the place of work to the home of the employee, if the transportation is a part of the contract of employment, the majority of cases hold that the employee is engaged in the employment or business of the employer while thus riding in the vehicle supplied by the employer.

AUTHORITIES

45 C.J.S., p. 916, Sec. 834;

Johnson, et al. v. Aetna Casualty and Surety Co. (C.C.A. 5th, 1939), 104 F. 2d 22;

Lumber Mutual Casualty Insurance Company v. Stukes (C.C.A. 4th, 1947), 164 F. 2d 571;

Westcott, et al. v. United States Fidelity & Guaranty Co. (C.C.A. 4th, 1946), 158 F. 2d 20;

City of Wichita Falls v. Travelers Insurance Co. (Texas, 1940), 137 S.W. 2d 170.

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Francis v. Scheper, 326 Mich. 447, 40 N.W. 2d 214.

In each of the foregoing cases, there was involved an insurance policy bearing an exclusion clause almost identical with the one at issue herein. However, unlike the present case, all of the cases cited under this point involve the transportation of employees to or from their homes to their place of employment. In each of these cases, either the trial court found, or the appellate court held, that the transportation was an implied or express part of the contract of employment.

In 45 C.J.S., at page 916, the general rule is stated to be as follows:

> "A clause excepting from coverage injuries or death sustained by an employee of insured while engaged in any business or occupation of insured, or in the course of employment or business of insured, has been held reasonable and valid unless contrary to statutory regulations. To render such a clause operative, the person injured must not only have been an employee of the insured, but he must also have been injured while he was engaged in insured's business or occupation. An employee injured while riding to or from work in his employer's automobile is not engaged in his employer's business or occupation, at least where the employer has not undertaken to furnish such transportation

> as an incident of the employment; *but where the transportation is a term of the employment, the employee is within the exception.*" (Italics supplied)

One of the cases cited by the authors in support of the foregoing quotation is that of *City of Wichita Falls v. Travelers Insurance Co.* (Texas, 1940), 137 S.W. 2d 170, which the appellant states was merely concerned with whether or not an employer-employee relationship existed (Ap. Br., p. 31). However, we feel that the Corpus Juris Secondum authors were careful in their selection of this case for it appears from that case that there were two issues, i.e., the existence of an employer-employee relationship *and* the contention that since the work day was over and the plaintiff injured on the way back, he was not "in the discharge of his duties as an employee" and therefore the exception in the policy for injuries to employees "engaged in the business of the assured" did not apply. The Texas court ruled against this contention, and for that reason the case is a pertinent authority.

In the case of *Westcott v. United States Fidelity & Guaranty Co.,* 158 F. 2d 20, the insured had engaged the decedent to work for him at a casino, and under the express terms of the contract of employment, the decedent was to be furnished transportation to and from her place of employment. While the decedent was thus being transported from her hotel to her place of employment, an accident occurred, resulting in decedent's death. The vehicle in which the decedent was being conveyed was insured by the plaintiff in the case, and the plaintiff brought a declaratory judgment action against

the administrator of the decedent and the insured. The trial court found the insurance company not liable because of an exclusionary clause identical with the one at issue in the case before this Court, and the defendants in that action appealed the decision. In affirming the trial court, Circuit Judge Dobie, speaking for the 4th Circuit Court of Appeals, stated as follows (158 F. 2d 20 at 23):

> "The law seems to be pretty well settled that when an employer, by express contract, furnishes to an employee transportation to and from the place of employment, the employee who is injured or killed while being so transported is injured or killed in the course of employment."

To a similar effect is the case of *Johnson, et al. v. Aetna Casualty & Surety Company,* 104 F. 2d 22. In that case, the transportation feature was not even an express term of the contract, but the custom had been followed for several years of permitting the employees to ride in the employer's truck if they were present when the truck started. Because of the distance from the plaintiffs' homes to the place of employment and the fact that the low wages paid called for such transportation by the employer, the Circuit Court of Appeals for the 5th Circuit, held that the arrangement for riding in the employer's truck was an implied part of the contract of employment, and also held that while so riding they were engaged in the employment of the insured employer and consequently were precluded from any recovery under the policy by virtue of the exclusionary clause contained therein.

The case of *Lumber Mutual Casualty Ins. Co. v. Stukes, et al.* (C.C.A. 4th), 164 F. 2d 571, is an interesting and enlightening decision. In that case the insured hired one Timmons, on a rate basis, to put siding on houses and furnished a truck to Timmons, which the latter used to transport men and material to the job. There was a dispute as to whether or not Timmons was an independent contractor, but that fact is here unimportant. The truck was insured by the plaintiff, and the policy contained an exclusion identical to that here involved. In the trial of the case in the District Court (72 F. Supp. 463), the trial judge, using the same arguments and reasoning employed by the appellant in his brief herein, held that the exclusion clause did not apply, stating as follows, at page 466:

> "But, if it be conceded that Eugene David Stukes at the time of his injuries and death was an employee of Marshall, the testimony discloses that he was not at that time 'engaged in the employment' of Marshall. At the time of the accident Eugene David Stukes was not engaged in any work, and was not performing any services for Marshall, or for anyone else; he was not entitled to any pay, and was not receiving any pay for any employment. He was merely riding as a fare-paying passenger from the place of his work to his home in a conveyance furnished to Timmons by Marshall."

However, when this case came before the Circuit Court of Appeals, Justice Parker, in reversing the District Court stated as follows (164 F. 2d 571 at 574):

> "And we do not think that the exclusion clause can be held inapplicable on the ground that Stukes was not 'engaged in the employment' of either

> Marshall or Timmons at the time of the accident, but was riding in the truck as a 'fare paying passenger.' The evidence shows beyond question that he was transported to and from work as an incident of his employment, whether 3% was deducted from his wages on this account or because of the requirement that unemployment insurance be paid. Such transportation was a part of his contract of employment; and there can be no question that under the law of South Carolina he enjoyed the status of an employee engaged in the employment at the time of the accident which resulted in his death."

In the instant case the appellant has alleged and admits that the transportation of the decedent was a part of her contract of employment, so under Justice Parker's reasoning there should be no question as to the applicability of the exclusion clause. Furthermore, we think this case effectively disposes of the continually repeated claims of the appellant that the exclusionary clause is ambiguous.

The only case expressing a contrary rule to that set forth in the cases above is *Francis v. Scheper, et al.,* 326 Mich. 447, 40 N.W. 2d 214, cited and relied on by the appellant in his brief on pages 17 and 18 thereof. In that case the plaintiff was employed by the insured on an hourly basis. The insured provided transportation to the employee from his home to the place of work and back. The employee was injured while being transported home after working hours in the employer's truck. In the original action brought against the employer, the trial court instructed the jury that the plaintiff could not recover against the employer unless the transportation of the plaintiff was a part of the con-

sideration of the contract of hire and the jury so found. Accordingly, it may be said that this is a case where the transportation was a part of the employment contract. However, in the original action the plaintiff did not claim that he was an employee of the insured, but on the contrary, claimed that he was a passenger for hire in the insured's truck. When the injured plaintiff sought to recover against the insured's company, that company defended on the ground that the plaintiff was an employee of the insured and came within an exclusion clause identical to the one in the case at bar. The Supreme Court of Michigan held against the insurance company and, as stated in the quotation on page 18 of the appellant's brief, particularly held that the words "engaged in the employment" did not exclude the plaintiff from recovery. Not a single one of the leading cases on this particular type of case was cited by the Michigan Supreme Court, but it merely placed reliance upon a number of cases calling for strict construction of provisions of insurance policies against the insurer.

It is to be noted that in the Michigan case the Supreme Court of Michigan took particular pains to point out that (40 N.W. 2d at 218):

> "Plaintiff did not claim in the principal case that the relation of employer and employee had anything to do with the liability of Houck to plaintiff further than that the furnishing of the ride was part of plaintiff's compensation for his work as a painter. Plaintiff nowhere in the main case claimed that he (plaintiff) was engaged in Houck's employment at the time of the accident.

"Plaintiff's claims in the main case are entirely consistent with his claims in the instant case, in which he claims Houck is indebted to him for the balance of the judgment in the principal case, and that consequently the casualty company is liable to him for such balance.

"Plaintiff's recovery in the principal suit therefore is based upon his claim that he was riding not as an employee but as a passenger for hire, as distinguished from a guest passenger. Plaintiff was not engaged in the employment of the principal defendant at the time the accident occurred, hence the clause in garnishee defendant's insurance policy excluding coverage of employees while engaged in the employment of the insured is not applicable in the case at bar."

In light of the authorities, we submit that the Michigan decision was wrong. However, right or wrong, it is clearly not applicable herein, for the following reasons:

1. The Michigan decision is a "work to home" case and not one of "place to place," as is the instant case.

2. Although the jury found the transportation was a part of the employment, the Supreme Court carefully pointed out that plaintiff was free to go anywhere he chose at the end of the day.

3. In that case the plaintiff at all times denied that he was an employee, but claimed he was a passenger for hire, whereas here the plaintiff in the court below claimed the decedent was an employee being transported pursuant to "her contract of employment."

C. The instant case is not controlled by those authorities wherein the transportation is not a part of the contract of hire but is a mere "gratuity."

On page 17 to 20 of his brief, appellant has cited a number of cases which he states to be similar to the case at bar and determinative of the problems here involved. We have already discussed the one case which is in point and shall now proceed with the remainder of the cases cited on those pages, with brief comments thereon to show their inapplicability.

The case of *B. & H. Passmore Metal and Roofing Co. v. New Amsterdam Casualty Co.* (10th Cir.) 147 F. 2d 536, is not in point, although analogous. In that case the decedent employee sometimes drove his own automobile to work and sometimes rode in the insured employer's truck. The Circuit Court of Appeals, in holding that an exclusionary clause, similar to the one in the case at bar, did not apply, held at page 538 as follows:

> "At the time of the accident Little was not engaged in any work and was not performing any service for Passmore, and he was not receiving any pay for his time. *He was simply riding from the place of work to Passmore's shop in a conveyance gratuitously furnished by Passmore.*"

It is apparent from the foregoing that this is not a case where the transportation was an integral part of the employment, either expressly or by implication.

In the case of *Elliott v. Behner,* 150 Kan. 876, 96 P. 2d 852, (App. Br., P. 20) the Supreme Court of Kansas there determined that an exclusionary clause similar to the case

at bar was not applicable and further found that the finding of the trial court to the effect that the transportation was a part of the employment was "not supported by the other findings and the undisputed evidence." Thus, this case is also one which does not control a situation where the transportation is an integral and agreed part of the contract of employment. To the same effect are the next two cases cited by the plaintiff, *Green v. Travelers Insurance Company,* 286 N.Y. 358, 36 N. E. 2d 620, and *State Farm Auto Insurance Co. v. Skluzacek, et al.,* 208 Minn. 443, 294 N.W. 413, in both of which the transportation was not a part of the contract of employment, but merely a gratuity furnished by the employer for those of the employees wishing to avail themselves of it. The case of *Braley Motor Co., Inc., v. Northwest Casualty Co.,* 184 Wn. 47, 49 P. 2d 911, is not determinative of the matter in issue at all, for the principal and only point involved in that case was whether or not the plaintiff was an employee of the insured, and having found that plaintiff was not insured's employee, the remaining language in the exclusionary clause was not involved.

D. Strict Construction of the Insurance Policy is Not Required.

Throughout his argument on the second specification of error and particularly on pages 16 and 17 of his brief, appellant has urged that since appellee prepared the contract in this case it is to be strictly construed against it. The Oregon cases cited for this proposition do not sustain appellant's statement, but do stand for the normal rule

that if a provision is ambiguous and susceptible of two or more meanings the court will construe the policy against the insurer. We have no quarrel with that rule, but the appellant has failed to demonstrate the requirements to bring it into play in this case. For that reason we are not taking this court's time to discuss the cases thereon.

E. Decisions on Workmen's Compensation Cases are Not Controlling in This Common Law Action.

Appellant cites *Lesser v. Great Lakes Casualty Co.*, 171 Or. 174, 135 P. 2d 810, for the proposition that cases involving the Workmen's Compensation Laws were not controlling in that case which involved an action by the assured under his policy for a recovery of the amount of a judgment paid by him to an independent contractor whom the insurance company asserted was an employee. We readily agree to the soundness of that decision and we think it supports another statement of appellant at the top of page 16 of his brief that cases under such remedial statutes throw little light on the matter at issue. Yet in spite of all this, appellant has more than three pages of his argument discussing a compensation case which he asserts is controlling of this case. We refer to *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 277 P. 91, 286 P. 527, 291 P. 375 (App. Br. pp. 21-24 and 32). Inasmuch as the court will undoubtedly read this leading Oregon case, we shall not burden the court with the details of the facts and the various decisions on the original opinion, the rehearing and the second rehearing. All of the quotations contained in the plaintiff's brief, taken from the

various phases of that opinion, are accurately stated. As we understand the appellant's contention with respect to the *Lamm* case, it simply is that the broad interpretations of the Workmen's Compensation Act should not be applied to this case.

We believe that the *Lamm* case is inapplicable here for the following reasons:

First: It is a decision wholly concerned with giving a broad interpretation of the Workmen's Compensation Act whereas this case is a common law action.

Second: The court in the *Lamm* case recognized the different rule applicable to common law actions, as will be noticed from the quotation from that case set forth at pages 13-14, supra.

What has been said above is equally applicable to the Washington decisions on Workmen's Compensation cases set forth on pages 24 and 25 of appellant's brief and we shall not discuss the same.

F. Appellant's Authorities on the Meaning of "engage" and on the Existence of an Employer-Employee Relationship are Not Applicable to the Facts of This Case.

At the bottom of page 20 of his brief, appellant cites a series of cases for the proposition that the word "engage" connotes "action in performing some duty, devoting attention and effort." The authorities cited cover cases from whether a boat was "engaged" in fishing to whether a soldier was "engaged" in war. There are literally hun-

dreds of cases in which this word has been construed (see, for instance, Words and Phrases, Vol. 14, pp. 589-629), and we submit that it is of no aid in the determination of this case to go into such unrelated cases when the word in its proper context has been so frequently considered in decisions on this very type of case. Accordingly, we shall not discuss this group of cases cited by appellant.

One case which the appellant has cited and which we believe needs to be discussed is that of *Rickenbaker v. Layton,* et al, 59 F. Supp. 156, (Ap. Br. P. 25). Appellant in his discussion of this case, states that "the facts in the *Rickenbaker* case are substantially the same as the facts under consideration here," and then proceeds to quote at length from said case. We think that if appellant's counsel had read this case carefully he would not have made the statement that he did as to the similarity between the facts of the case at bar and those of the *Rickenbaker* case. In this case, counsel for the appellant has admitted that the decedent was an "employee" of the assured. The principal matter in contention in the *Rickenbaker* case was whether or not there was any employment at all at any time. The facts of that case simply were that a rural mailman was asked by his friend, the employee of the assured, to drive out along a rural mail route with the friend in order to point out the location of certain persons living on the mail route. We think two findings of the court clearly show the case to be inapplicable. They are findings Nos. 8 and 9 appearing on page 163 of the opinion, and are as follows:

> "8. That there was no agreement between Smith, either as an individual or as agent of the insured, and

the plaintiff that the plaintiff would be compensated for any services rendered or for any information furnished on the afternoon in question;

"9. That the plaintiff has never been paid, or offered any pay, for whatever he may have done on the occasion in question, nor has he ever asked for any pay therefor, notwithstanding more than five years have now elapsed since the event;"

The court went on to state that regardless of what the plaintiff in that case might have been doing for the benefit of the insured's driver by pointing out the locations of certain residences, that the accident happened some two hours after the parties had gone over the mail route in question. Accordingly, the quotation appearing on page 25 of the appellant's brief must be read in light of those facts, and we heartily concur in the decision of the district judge in that case on those facts.

III.

Third and Fourth Specifications of Error.

ARGUMENT.

These two specifications of error will be determined by the Court's decision as to the first two specifications of error, and therefore appellee deems no separate argument necessary.

CONCLUSION

Public liability policies such as the one involved herein have a definite and useful place in our automobile age. But they were not designed nor intended to supplant the provisions of the workmen's compensation laws nor the employer's liability laws, nor specific employee insurance. It is patent on the face of the policy here involved that this policy was designed to protect members of the public and not Kalahar's employees.

We see no occasion for attempting to pin the designation "ambiguous" on phrases having a common and clear meaning. Insurance companies and their contracts have not always received impartial treatment, but that is no reason for endeavoring to write new contracts between them and their insureds when the agreements are clear, concise and readily understood by laymen.

The appellee herein is entitled to have the judgment of the District Court affirmed. The employment issue herein sought to be litigated by plaintiff already has been decided by the Circuit Court of the State of Oregon on allegations, issues and instructions of the plaintiff's own choosing. To get his judgment below, he took a definite and unalterable position that at the time of her death decedent was the employee of the insured, and was being transported by him pursuant "to her contract of employment." Unless, at the time of the accident, she and the driver were engaged in their respective employments, the plaintiff could not have recovered from Kalahar. That having been determined, the same is *res judicata,* and the defendant is entitled to judgment.

However, even if the plaintiff can in this action retry that issue, the authorities are clear that under an exclusion clause such as we have in this case, there is no liability upon the part of the insurer for injuries to or death of employees who are being transported by the employer-insured pursuant to the contract of employment between them, especially when that transportation is between two different places where work is to be done.

In conclusion, we respectfully submit that the trial court's findings, conclusion and judgment were correct and should be affirmed.

Respectfully submitted,

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